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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 50

LULU B. McGEE,
Petitioner,

vs.

INTERNATIONAL LIFE INSURANCE COMPANY,
Respondent.

BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

Questions Presented

The ultimate question presented is whether or not the judgment of the California court sued upon in Texas is void for want of jurisdiction in the California court. Respondent presents two questions as to the validity of such California judgment.

(1) Did respondent have such minimum contracts within California as to subject it to the juris-

diction of the California court under the California Unauthorized Insurers Process Act in view of the due process clause of the Fourteenth Amendment to the Constitution of the United States?

(2) Did the California Unauthorized Insurers Process Act, which was not passed and did not become effective until after the insurance policy sued on had been issued and delivered, confer jurisdiction on the California Court as to respondent to render the judgment sued on in view of the due process clause of the Fourteenth Amendment to the Constitution of the United States?

Statement of the Case

If petitioner by its argument has given this court the impression that this case involves a "mail order" insurance business (Petition for Writ of Certiorari p. 4; Brief for Petitioner p. 4-5), the impression is incorrect and not supported by the record.

Respondent has never engaged in the "mail order" business in California or for that matter in any other state.

The stipulations in the trial court specifically set out that neither respondent nor its predecessor has "*in any way* carried on *any business activity* within the State of California except as herein stipulated" (R. 21).

It was stipulated that neither respondent nor its predecessor had ever maintained an office of any nature whatsoever in the State of California nor

did either company have or maintain an agent or sales personnal in California nor did either of such companies actually appoint any person or officer in California as an agent of any nature for service of citation or for any other purpose nor has either of such companies or any agent or employee of either company ever been served within the State of California with summons and complaint in any court proceeding of any nature whatsoever (R. 20-21).

The only involved activities of respondent are hereinafter set out.

On September 1, 1948, respondent, a Texas corporation, entered into an agreement with the Empire Mutual Insurance Company, an Arizona benefit or assessment company, under which respondent became obligated to mail to each policy holder of the Arizona assessment company a reinsurance certificate (R. 16, 37-43).

Lowell Stepp Franklin was a member or policyholder of the Arizona assessment company and respondent in 1948 mailed from its home office in Austin, Texas, such reinsurance certificate to Franklin (R. 16-17).

The California Unauthorized Insurer's Process Act did not become effective until October 1, 1949 (R. 55).

The policy involved provided for $5,000 for accidental death and for monthly payments for loss of time by accidental means or for loss of time by sickness. The monthly premium was $1.00 (R.

21-36). The original policy provided that it shall be deemed made and liablity arises in connection therewith at Phoenix, Arizona, (R. 35). The reinsurance certificate modified the policy so that "Austin, Texas" shall be substituted for "Phoenix, Arizona" (R. 33).

Respondent mailed preimum notices from Texas to Franklin in California and Franklin mailed premiums in California to respondent in Texas (R. 17).

After the death of Franklin on December 1, 1950, proofs of death were mailed to respondent in Texas and after due consideration of such proofs, respondent refused to pay the $5,000 claimed (R. 17).

The policy expressly provided that it did not cover any loss caused by suicide while sane or insane (R. 30).

The proofs of death submitted by petitioner showed that Franklin's death was the result of suicide. Respondent offered these proofs in the trial court (R. 59-60) after having plead such facts (R. 6 (9)-10).

Petitioner filed suit against respondent in California and with service only under *Sections 1610-1620* of the *California Insurance Code* obtained judgment by default when respondent failed to file an answer in California (R. 18-20, 50-52).

Suit was filed on the California judgment in Texas and the trial court denied recovery (R.13-15). The judgment of the trial court was affirmed by the Texas Court of Civil Appeals (R. 67-68). The Supreme Court of Texas refused writ of error (R. 91).

Argument

(1) *The courts below correctly denied recovery because under the due process clause of the Fourteenth Amendment respondent did not have such minimum contracts within California as to subject it to the jurisdiction of the California court under the Califronia Unauthorized Insurers Process Act.*

As to this question, the case of *International Shoe Company vs. State of Washington, et al., (1945), 326 U. S. 310, 66 S. Ct. 154, 90 L. Ed. 95*, now appears to be the leading case on the subject. The facts were that the out of state corporation employed eleven to thirteen salesmen, during the four years involved, who resided in the State of Washington, whose commissions on their Washington business amounted to more than $31,000 each year, who displayed samples of shoes to prospective purchasers and on occasion rented permanent sample rooms in business buildings or hotels, the cost of such rentals being reimbursed by the out of state corporation, all resulting in a substantial volume of merchandise being regularly shipped by the out of state corporation to purchasers within the state. Service was had upon a solicitor employed by the out of state corporation in the State of Washington and also a copy of the notice of assessment was mailed by registered mail to the home office of the corporation.

This court found that the activities of the out of state corporation were neither irregular nor casual, that they were systematic and continuous through-

out the years in question and resulted in a large volume of interstate business and, therefore, the maintenance of the suit in the State of Washington did not involve an unreasonable or undue procedure.

After discussing many of the earlier opinions, this Court reached the general conclusion that:

> " . . . due process . . . requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contracts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" (326 U. S. 316).

The court stated as to the due process clause:

> "That clause does not contemplate that a state may make binding a judgment in personam against an individual or corporate defendant with which the state has no contact, ties or relations. Cf. Pennoyer vs. Neff, supra; Minnesota Commercial Men's Ass'n. vs. Benn, 261 U. S. 140, 43 S. Ct. 293, 67 L. Ed. 573." (326 U. S. 319).

The case of *Minnesota Commercial Men's Ass'n. v. Benn (1923) 261 U. S. 140, 43 S. Ct. 293, 67 L. Ed. 573* appears reaffirmed as constitutiong "no contacts, ties or relations."

The facts in the instant case show less minimum contacts by this respondent with the State of California than were the contacts by the insurance company in the *Benn case, supra*, with the State of Montana.

In the *Benn case, supra*, the insurance company involved did a regular "mail order" business in Montana where new members were procured by advertisement and through the solicitation of old members with occasional premiums or prizes being given to the soliciting members. Proofs of loss were made on forms provided by the company; and generally in the event the attending physician's certificate was inadequate, the company procured additional information from local physicians. The premium notices were regularly mailed to the Montana policyholder and he paid dues and assessments by mail. Nothing was unusual or irregular in the proofs of death or the report of the attending physician; but without further investigation and upon unsolicited information received through the mail, the Association declined to pay.

This court concluded that the record failed to show that the out of state company was doing business in Montana within the proper meaning of those words and that the court there lacked jurisdiction to award the challenged judgment.

The activities of respondent in Califronia in this case did not even consist of the solicitation of new members or policyholders and this respondent did nothing more, and in fact less, than did the out of state company in the *Benn case, supra.* Certainly respondent's activities in California were not systematic or continuous and did not result in a large volume of interstate business as did the activities of the out of state company in the *International Shoe Company case, supra.* This record affirmatively shows that neither respondent nor its predecessor has in any way carried on any business activity

within the State of California except with the one policyholder involved in this suit who was paying a premium of $1.00 a month. This is an incredibly meager contact upon which to seek to sustain the jurisdiction claimed for the California court by petitioner.

In *Travelers Health Ass'n. et al. vs. Commonwealth of Virginia, (1950), 339 U. S. 643, 70 S. Ct. 927, 99 L. Ed. 1154*, in the opinion written by Mr. Justice Black, in which three other members of the Court joined, the *International Shoe Company case, supra*, was relied upon. It was held, where the Travelers conducted a mail order health insurance business from Omaha, having solicited Virginia members by mail and through those already members for more than forty-five years and having caused many sick benefit claims to be investigated in Virginia and having, at the time the proceedings involved were instituted, approximately 800 Virginia members, that the Association did not engage in mere isolated or short-lived transactions; that its insurance certificates, systematically and widely delivered in Virginia, following solicitations based on recommendations of Virginians, created continuing obligations between the Association and each of the many certificate holders in the state and that the proceeding against the out of state corporation was consistent with "fair play and substantial justice" and was not offensive to the due process clause.

Mr. Justice Black concurred; but in doing so stated:

> "I put to one side the case where a policyholder seeks to sue the out of state company in

> Virginia. His ability to sue is not necessarily the measure of Virginia's power to regulate, as the Court said in Old Wayne Mutual Life Insurance Company of Indianapolis, Indiana, vs. McDonough, 204 U. S. 8, 21, 27 S. Ct. 236, 40, 51 L. Ed. 345." (339 U. S. 652-2).

Mr. Justice Minton, in an opinion concurred in by three other members of the court, while expressing the view that the appeal should be dismissed, took issue with the interpretation of the "majority" opinion and expressed the view that an in personam judgment could not be based upon service by registered letter on a non-resident corporation or a natural person, neither of whom has ever been within the state (339 U.S. 658). Such opinion also stated that the minimum contacts under the *International Shoe Company case, supra*, must be "activities of the corporation's agent within the state." It was pointed out that there were such contacts by agents within the state in that case and that in addition to notice by registered letter, personal service within the state was obtained upon one of the company agents. (399 U.S. 659).

Respondent in this case has never had an agent of any kind in the State of California.

In *Perkins vs. Benguet Consolidated Mining Co., (1952) 342 U. S. 437, 72 S. Ct. 413, 96 L. Ed 485*, this court, again following and quoting at length from the *International Shoe Company case, supra*, held that no requirement of federal due process either prohibits Ohio from opening its courts to the cause of action involved against a foreign corporation or compels Ohio to do so.

In the Perkins case the president of the foreign corporation, who was general-manager and principal stockholder of the company returned to his home in Ohio from the Philippine Islands and there maintained an office where he kept the files of the company, carried on correspondence relating to the business of the company and its employees, distributed salary checks on behalf of the company, both to himself as president and to two company secretaries, maintained two active bank accounts carrying substantial balances of company funds, held several directors meetings in Ohio, supervised policies of the company dealing with the rehabilitation of the corporation's properties in the Philippines and dispatched funds to cover purchases of machinery for such rehabilitation and thus carried on in Ohio a continuous and systematic supervision of the necessarily limited wartime activities of the company.

This court stated that:

> "The essence of the issue here, at the constitutional level, is a like one of general fairness to the corporation. Appropriate tests for that are discussed in International Shoe Co. vs. Washington, supra, 326 U. S. at pages 317-320, 66 S. Ct. at pages 158, 160. The amount and kind of activities which must be carried on by the foreign corporation in the state of the forum so as to make it reasonable and just to subject the corporation to the jurisdiction of that state are to be determined in each case. . . ." (342 U. S. 445).

Obviously the amount and kind of activities carried on by the respondent in California are not such

so as to make it reasonable and just to subject this respondent to the jurisdiction of that state. The facts involved in the instant case are not analagous to those in any case which has been referred to by petitioner nor in any case which we have been able to find. In no such case has the jurisdiction been sustained upon a contact with only one individual whose gross business amounted to $1.00 monthly.

While the individual policyholder in a particular case sometimes may elicit sympathy, the effect of liberalizing or extending the rule permitting suits against insurers from far away states upon policyholders generally should be given serious consideration. Insurance is a business which is and should be conducted for the benefit of policyholders generally rather than for the unjust enrichment of policyholders such as the one represented by petitioner in this case. If respondent is compelled to pay an amount for which it is not liable under its contract, as it would be if the action of the lower courts be reversed, or if respondent and other insurers are compelled to defend isolated claims in distant states, the expense of doing so will lead to the ultimate disadvantage of policyholders as a whole. This general disadvantage should outweight any individual inconvenience or apparent hardship upon an individual policyholder. This reasoning has already been recognized by some courts. See *Atlas Mut. Ben. Asso. vs. Portscheller, (1945) 43 Del. 298, 46 A. 2d 643* and *Tomlinson vs. Iowa State Traveling Men's Assn., (1918) 251 Fed. 171.*

Further recognition should be given by modern day courts that most life insurance companies do not

now contest valid claims. It is not good business to do so. If this respondent had been liable upon the policy sued upon, we would not be here nor would it have been necessary for petitioner to file suit in the California court if she had a valid claim. Payment would have been made without suit.

In the instant case there can be no question about the non-liability of the insurer on the policy. It is surprising that the California court rendered the judgment sued upon even though no defense was made. The $1.00 a month policy excluded suicide as a risk assumed. The proofs of death furnished by petitioner herself showed that the insured died as a result of suicide. It was upon the basis of petitioner's own proof that liability was denied by respondent. If insurers generally are compelled to go to the expense of defending suits of the kind here involved in distant states with which they have had no more contact than did respondent with California, the effect upon policyholders generally will be a necessary increase in premiums to meet the expense of defending such suits. Such a result is neither traditionally fair nor just.

We respectfully submit that under the tests laid down by the *International Shoe case*, *supra*, and the cases following its reasoning, this respondent had no such minimum contacts as would justify subjecting it to the jurisdiction of the California court under our traditional concepts of fair play and justice. The judgments of the courts below should accordingly be affirmed.

(2) *The courts below correctly denied recovery because under the due process clause of the Fourteenth Amendment the California Unauthorized Insurers Process Act, which was not passed and did not become effective until after the insurance policy sued on had been issued and delivered, did not confer jurisdiction on the California court as to respondent to render the judgment sued on.*

The policy sued on was originally issued on April 21, 1944 (R. 16). The reisurance certificate was issued by respondent in 1948 (R. 16-17). The California Unauthorized Insurers Process Act did not become effective until October 1, 1949 (R. 55).

In *Parmalee vs. Iowa State Traveling Men's Associtation, (1953) 206 F. 2d 518, (Cert. Den. 346 U. S. 877, 74 S. Ct. 125, 98 L. Ed. 384)*, the Fifth Circuit, while upholding the validity of the Florida statute upon the ground that an unauthorized foreign insurer is put on notice by the statute of the consequences of its acts, expressly limited such holding by stating:

> "And even then, the nature and effects of the statute, and the basis for its constitutional validity, enjoin a construction no broader than necessary to effect the expressed public policy to subject unauthorized insurers who effect and continue insurance contracts delivered in Florida to Florida residents to suits in Florida which assert legal rights under such policies. Furthermore, as a regulatory law it plainly can be giver no effect which will impose, retroactively, the provisions of the statute upon unauthorized insurers having policies in force

> prior to the enactment of the statute. These distinctions are not hypothetical, but are substantial, in the proper application of the statute. They mark the line between due process and unauthorized state action." (206 F. 2d 522-3).

The same court in *Parmalee vs. Commercial Travelers Mutual Accident Association of America, (1953) 206 F. 2d 523*, held that under the Florida Unauthorized Insurers Process Act of 1949, a suit in Florida to enforce a certificate of insurance delivered by mail in the State of Kentucky in 1936 to the insured who thereafter, in 1946 or 1947, moved to Florida could not be sustained and that the order of the trial court quashing the service of process was correct.

The court gave as its reason for such decision the following:

> "Under our ruling in Parmalee v. Iowa State Traveling Men's Association, 5 Cir., 206 F. 2d 518, the certificate not being delivered in Florida to a Florida resident, subsequent to the effective date of the Florida statute referred to, the suit to enforce it does not come within the provisions of the statute." (206 F. 2d 524).

The same holding was also made in *Berg vs. Commercial Travelers Mutual Accident Association of America, (1953) 207 F. 2d 775.*

Although not relied upon or discussed by petitioner, *Schutt vs. Commercial Travelers Mutual Accident Association (1956), 229 F. 2d 158 (Cert. Den. 351 U. S. 940, 76 S. Ct. 836, 100 L. Ed. 1466)*, by the Second Circuit involved a construction of the Ten-

nessee Act of 1947. The court cited the *International Shoe case, supra,* for the proposition that state statutes which provide for substituted service against non-residents and foreign corporations will support judgments in personam provided there exist "certain minimum contacts" within the territory of the forum of such a character "that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"

The court found that:

> "The activities of defendant in Tennessee were: the usual solicitation of new business by 'members', with prizes, advertising matter and application blanks; notices of assessments or premiums due, sent regularly through the mail to decedent and to other policyholders and received by him and by others at their Tennessee homes; acceptance of remittances for assessments or premiums mailed in Tennessee; and the mailing of proofs of loss in Tennessee and the presence of an investigator of defendant on the premises after the fire." (299 F. 2d 160).

The Second Circuit stated that an interpretation which excluded from the operation of the Tennessee statute policyholders who had received their policies prior to the effective date of the statute would seem to have no relationship to the purposes for which the legislation was passed.

While so construing the Tennessee Act, the Second Circuit does not appear to have considered that such a construction directly involved due process as to whether such act can be given effect when it imposes retroactively the provisions of the statute upon

unauthorized insurers having policies in force prior to the enactment of the statute. It apparently was not recognized, as held by the Fifth Circuit, that the distinction is substantial and marks the line between due process and unauthorized state action for the Second Circuit, after discussing its construction of the Tennessee statute states:

> "The constitutional question is more difficult of solution." (229 F. 2d 161).

Under its discussion of the constitutional question, the Second Circuit does not mention the due process distinction made by the Fifth Circuit as to the invalidity of a retroactive effect of such a statute but proceeds to discuss the rule laid down in the *International Shoe Company case, supra,* and other cases following it, as to the constitutional minimum contacts. The court points out that the defendant in the *Schutt case, supra,* had hit upon a way of transacting its business which reduced its contacts with its policyholders and its method of obtaining new business to communications by mail; but that the result was precisely what it would have been if salesmen rather than "members" procured new customers and if agents went from house to house collecting premiums instead of sending notices and receiving remittances through the mail. It was stated that this was done year after year on a large scale in a systematic and regular way and that doubtless large numbers of policies were issued in due course to residents of Tennessee each year and these were administered and processed in due course in addition to those already held by others.

It would seem, therefore, that the reasoning of the Second Circuit in resolving the "difficult" constitutional question was upon the basis that the defendant in that case was generally engaged in the mail order business in Tennessee, rather than upon the retroactive effect of the statute which was not discussed under the "constitutional question", because the court expressly states in reversing and remanding the case that if there is any doubt about *the extent* of defendant's mail order insurance business in Tennessee, plaintiffs should be afforded an opportunity to amplify the proofs appearing in their affidavits. (229 F .2d 162).

In any event, the *Schutt case, supra*, definitely recognizes the necessity for the minimum contacts required by the *International Shoe Company case, supra*. Respondent did not have such minimum contacts with California.

If there be a real conflict as to the constitutional question between the *Schutt case, supra*, and the *Parmalee* and *Berg cases, supra*, then we submit that the holdings of the *Parmalee* and *Berg cases, supra*, as to the invalidity of the retroactive effect of such an act are more reasonable and just.

When a foreign unauthorized insurer deliberately institutes a general mail order insurance business in a state which has already adopted an Unauthorized Insurers Process Act, the subjecting of such an insurer to suits within such state may be understandable. The foreign insurer can know that he does a mail order business at the risk of being sued in the state in which policies are solicited after the passage of such an act.

This is not the situation in the instant case. Here

respondent in compliance with its written contract with the Arizona corporation was obligated to issue its reinsurance certificate to the California policyholder and to thereby continue the life policy which the Arizona corporation had issued. It did so before the California Act was passed. The sending of premium notices thereafter was merely a customary convenience to the policyholder.

The State of California by thereafter enacting its Unauthorized Insurers Process Act should not be permitted to destroy the contract involved or to make its mere continuance, independent of acts within the limits of California, a privilege to be granted or withheld. Neither the continuance of the policy contract nor acts done elsewhere on account of it should be regarded as being within the state's control. Even the California courts have so held.

In *Western Travelers Accident Association of California vs. Johnson, (1936) 58 P. 2d 206, 209,* the court was construing the reinsurance by a California corporation of policies originally issued in Nebraska in connection with the California premium tax provision in its Constitution. The court stated:

> ". . . The continuance of the contracts of insurance, whether written in Nebraska or California, was not dependent upon the consent of the State of Nebraska. It is the actual transaction of business that furnishes the ground of license exaction, and not the mere existence of the obligation under the policies previously written. These policies are contracts already made; the State of Nebraska 'cannot destroy them or make their mere continuance, independent of acts within its limits, a privilege to be granted or withheld. Neither the continu-

> ance of the obligation in itself, nor acts done elsewhere on account of it, can be regarded as being within the State's control.' Providence Sav. L. Assur. Society vs. Kentucky, supra."

Under the undisputed facts in the instant case, traditional notions of fair play and justice require the holding that the California Unauthorized Inthe holding that the California Unauthorized Insursurer's Process Act, since it was not passed until after the policy sued on had been issued and delivered, was not sufficient to confer jurisdiction on the California court as to this respondent to render the judgment sued on.

Conclusion

The rule of this court requiring certain minimum contacts within the state before a foreign corporation may be subjected constitutionally to suit in such state is sound and fair. Since no such contacts exist in this case, such rule should be controlling. Also, it would be unjust to apply retroactively the California Unauthorized Insurers Process Act to this respondent.

For either or both of the reasons stated, the judgments of the courts below should be affirmed.

Respectfully submitted,

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Proof of Service

I, Stanley Hornsby, one of the attorneys for International Life Insurance Company, respondent herein, and a member of the Bar of the Sureme Court of the United States, hereby certify that on the 9th day of August, 1957, I served a copy of the foregoing Brief for Respondent on Lulu B. McGee, petitioner herein, by mailing a copy thereof in duly addressed envelope with air mail postage prepaid to Mandell and Wright, petitioner's counsel, at their office in the South Coast Building, Main at Rusk Street, Houston 2, Texas.

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